# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statutes involved | 2 |
| Statement | 3 |
| Argument | 8 |
| Conclusion | 14 |


## CITATIONS


Cases:

*Baltimore & Ohio R.R.* v. *United States*, 201 F. 2d 795 — 9

*California* v. *United States*, 320 U.S. 577 — 8

*Cargill, Inc.* v. *Commodity Exchange Commission*, 103 F. Supp. 992 — 10

*Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, 143 F. 2d 676 — 9

*District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100 — 13

*Rice* v. *Board of Trade*, 331 U.S. 247 — 10

*Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 — 9, 10

*United States* v. *American Union Transport, Inc.*, 327 U.S. 437 — 8

*United States* v. *Morton Salt Co.*, 338 U.S. 632 — 13

Statutes:

Commodity Exchange Act, 7 U.S.C. 1, *et seq.* — 10

Public Law 87-346, 75 Stat. 764 — 13

Shipping Act, 1916, as amended, 46 U.S.C. 801, *et seq.*:

Section 1 — 2, 8

Section 15 — 2, 3, 5, 6, 7, 8, 12, 13

Section 16 — 4, 8

Section 17 — 2, 8, 12

United States Warehouse Act, 39 Stat. 486, as amended, 7 U.S.C. 241 *et seq.* — 7, 8

Section 29 — 2, 9, 10, 11




624688—62——1

# In the Supreme Court of the United States

OCTOBER TERM, 1961

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No. 607

GREATER BATON ROUGE PORT COMMISSION AND CARGILL, INC., PETITIONERS

*v.*

UNITED STATES OF AMERICA AND FEDERAL MARITIME BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES OF AMERICA AND THE FEDERAL MARITIME COMMISSION IN OPPOSITION**

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**OPINION BELOW**

The opinion of the court of appeals (Pet. 13–28) is reported at 287 F. 2d 86. The report (Pet. 29–42) and order (Pet. 43) of the Federal Maritime Board [1] are reported at 5 F.M.B. 648, 658.

[1] On August 12, 1961, pursuant to Reorganization Plan No. 7 (H. Doc. No. 187, 87th Cong., 1st Sess.), the Federal Maritime Commission succeeded to the regulatory functions of the Federal Maritime Board. The Federal Maritime Commission and its predecessors are hereinafter referred to as the "Commission," in accordance with the nomenclature adopted in the petition (p. 2, n. 1).

## JURISDICTION

The court of appeals entered judgment on February 7, 1961 (Pet. 44), and denied a petition for rehearing on September 14, 1961 (Pet. 45). The petition for a writ of certiorari was filed on December 13, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the maritime functions of a port terminal grain elevator operator licensed to operate as a warehouseman by the Secretary of Agriculture under the United States Warehouse Act are subject to regulation under the Shipping Act, 1916.

2. Whether the court of appeals abused its discretion in denying petitioners rehearing of the question whether an agreement was required to have been filed under Section 15 of the Shipping Act, 1916, in view of the institution by the United States of statutory penalty proceedings for effectuation of the agreement without prior Commission approval.

## STATUTES INVOLVED

The pertinent provisions of Sections 1 and 15 and Section 17 of the Shipping Act, 1916, as amended, 46 U.S.C. 801 and 814, and 46 U.S.C. 816, are set forth, respectively, in Appendix E (pp. 46–47) and Appendix B (p. 42) to the petition. Section 29 of the United States Warehouse Act, as amended, 7 U.S.C. 269, is printed at Appendix E to the petition (p. 48).

## STATEMENT

This litigation began when petitioners, Cargill, Inc. (Cargill), and the Greater Baton Rouge Port Commission (Port Commission), filed with the Federal Maritime Commission for approval, if required, a lease of a Port Commission grain elevator to Cargill (F.M.B. agreement No. 8225) and an amendment thereto (F.M.B. agreement No. 8225–1). After full administrative proceedings, the Commission held that both agreements were subject to approval under Section 15 of the Shipping Act before they could be lawfully carried out (Pet. 38–39). Agreement No. 8225 was approved (Pet. 39), but the Commission refused to approve agreement No. 8225–1 (Pet. 40). The Commission also ruled that petitioners had violated Section 15 by effectuating the basic lease agreement prior to its approval (Pet. 39). On review, the court of appeals unanimously affirmed (Pet. 28).

Cargill is a corporation engaged as an owner, handler and dealer in grain. The Port Commission is a regulatory agency of the State of Louisiana having jurisdiction over the Greater Baton Rouge Port area. In 1955, the Port Commission entered into a lease agreement with Cargill granting to the lessee for 20 years, with a renewal option for an additional 20 years, the exclusive right to operate a public grain elevator and wharf situated on the Mississippi River within the Greater Baton Rouge Port area (Pet. 14, 31), as well as a first option to operate any additional grain and storage handling facilities that the Port Commission might construct (Pet. 32). Other terms

## UNITED STATES WAREHOUSE ACT

(7 U. S. C. A. 241 *et seq.*)

SECTION 29 as amended in 1931:

SEC. 29. That in the discretion of the Secretary of Agriculture he is authorized to cooperate with State officials charged with the enforcement of State laws relating to warehouses, warehousemen, weighers, graders, inspectors, samplers, or classifiers; but *the power, jurisdiction, and authority conferred upon the Secretary of Agriculture under this Act shall be exclusive with respect to all persons securing a license hereunder so long as said license remains in effect.* This Act shall not be construed so as to limit the operation of any statute of the United States relating to warehouses or to warehousemen, weighers, graders, inspectors, samplers, or classifiers now in force in the District of Columbia or in any Territory or other place under the exclusive jurisdiction of the United States. (Emphasis added.)

in the lease bind Cargill to "give preference to this grain elevator over other grain elevators operated by [it] in the Gulf area" to the extent that such preference is "economically feasible" (Pet. 31), and to maintain rates on a "competitive basis with published rates at New Orleans and other Gulf ports" (Pet. 14). Petitioners did not file the lease agreement with the Commission for Section 15 approval at the time it was executed (Pet. 15). Cargill, however, did file a copy with the Secretary of Agriculture (Pet. 3–4), in connection with its application for a license as a warehouseman under the United States Warehouse Act. The Secretary issued a warehouseman's license to Cargill (Pet. 15).

In 1957, the basic lease was amended by agreement No. 8225–1 requiring Cargill to furnish "stevedoring service for vessels calling at the grain elevator" and authorizing Cargill to "condition the loading and unloading of vessels on their using Cargill's stevedoring service exclusively" (Pet. 14–15). Both agreements were filed with the Commission for approval on April 25, 1957 (Pet. 15). A competing stevedoring firm protested and the Commission then instituted an investigatory proceeding to determine whether the two agreements had been carried out prior to Commission approval in violation of Section 15 of the Shipping Act, 1916, and whether operation under such agreements would violate Section 16, First, or Section 17 of the Act or contravene any of the standards of Section 15 (Pet. 30).

After hearing, the Commission examiner issued a recommended decision finding that the basic agree-

ment was not subject to the filing and approval requirements of Section 15, but that, even if it was so subject, it was not inconsistent with the standards of Section 15 and should be approved for future operations. The supplemental agreement was found to be subject to Section 15, in violation of Section 17 and detrimental to commerce under Section 15, and thus approval of this agreement was not recommended (Pet. 31).

Upon review the Commission reversed the examiner as to the need for prior Commission approval of the basic agreement under Section 15, but otherwise confirmed his recommendations. The Commission first decided, as had the examiner (Pet. 37), that regulation of Cargill's grain storage activities by the Secretary of Agriculture under the United States Warehouse Act "in no way limit[ed] [the Commission's] jurisdiction over Cargill's terminal activities under the "Shipping Act" (Pet. 37),[2] and it found that petitioners were "other persons" subject to the Shipping Act (*ibid.*)

Analyzing the basic lease, the Commission concluded that the provisions for competitive rate maintenance, preference of the Baton Rouge facility, and exclusive operation of the terminal by Cargill for up to 40 years constituted an agreement to "fix and regulate transportation rates or fares, give special privileges or advantages, control, regulate, prevent

[2] The Port Commission has conceded that it is subject to the provisions of the Shipping Act and the jurisdiction of the Federal Maritime Commission (Pet. 16).

or destroy competition, and provide for an exclusive, preferential or cooperative working arrangement within the meaning of section 15" (Pet. 38–39). Therefore, approval of the lease was held to be a prerequisite to valid operation thereunder (Pet. 39). Finding that petitioners had operated under the basic lease since 1955 without prior approval, the Commission ruled that they had to this extent "acted unlawfully and in violation of section 15" (*ibid.*). It concluded, however, that the record did not show the basic agreement to be "unjustly discriminatory or unfair or detrimental to the commerce of the United States or in violation of the Shipping Act" (*ibid.*), and therefore approved the future operation of the facilities pursuant to the basic agreement.

Discussing the amendment to the lease, the Commission observed that since it provides that "Cargill will render stevedoring services exclusively at the grain terminal here involved," it "controls and regulates competition," and thus requires approval before it can be lawfully effectuated (Pet. 39).[3] Finding that the amendment "would create in Cargill a monopoly over activities which take place exclusively on the vessel and not on terminal property" (Pet. 40), the Commission held that its effectuation "would be detrimental to the commerce of the United States, and would be an unjust and unreasonable practice

[3] The Commission found that the amendment had not been carried out prior to approval, in violation of Section 15 (Pet. 37, 39).

[resulting] in violation of section 17 of the Shipping Act, 1916" (Pet. 40). For this reason, the Commission refused to approve the amendment (*ibid.*).[4]

The court of appeals affirmed unanimously (Pet. 13–28), holding expressly (Pet. 16–22) that there was no conflict between the jurisdiction of the Commission under the Shipping Act and the Secretary of Agriculture under the United States Warehouse Act, 7 U.S.C. 241, *et seq.*; and (Pet. 22–26) that both the basic agreement and the amendment were agreements requiring prior approval of the Commission under Section 15 of the Shipping Act. It found no reason to disturb the Commission's conclusion that the amendment would be unjustly discriminatory, unfair and unreasonable and therefore detrimental to commerce in the United States (Pet. 26–28). A petition for rehearing, based upon the filing by the United States, subsequent to oral argument but prior to the court's decision, of an action to recover civil forfeitures from Cargill for failure to secure Commission approval prior to putting the basic agreement into effect (see Pet. 6), was denied "without prejudice to the petitioner's right, if any, to request mitigation of any penalty for which they may be liable" (Pet. 45).

[4] The Commission considered the asserted justification for the amendment, *i.e.*, that Cargill's stevedoring monopoly would provide more efficient service, but found the evidence in support of this contention to be "not * * * persuasive" (Pet. 40). Instead the Commission found the stevedoring provided by the protestant had "gradually improved" and "evidenced some superiority" over that furnished by Cargill (*ibid.*).

624638—62——2

ARGUMENT

The decision of the court below was clearly correct, and the petition presents no substantial question of law warranting review by this Court. The writ should accordingly be denied.

1. Petitioners' primary contention is that Cargill's activities in connection with the operation of the Baton Rouge port terminal grain elevator fall within the exclusive jurisdiction of the Secretary of Agriculture under the United States Warehouse Act, 7 U.S.C. 241, *et seq.*, and therefore cannot also be regulated by the Commission (Pet. 7–9). Petitioners do not contest the fact that Cargill, like the Port Commission, is an "other person subject to" the provisions of the Shipping Act, 1916, within the meaning of Section 1 of that Act and the relevant decisions of this Court. See *California* v. *United States*, 320 U.S. 577; *United States* v. *American Union Transport, Inc.*, 327 U.S. 437, 443, 451.[5] It is argued, however, that the fact that Cargill has received a license from the Secretary of Agriculture to operate the warehouse under the provisions of the Warehouse Act ousts the Commission from the jurisdiction it might otherwise have over such of Cargill's operations of the warehouse falling within Sections 15, 16 or 17 of the Shipping Act, 46 U.S.C. 814–16.

There is, of course, nothing unusual about the situation in which two or more federal agencies have

[5] Section 1 defines "other person subject to this act" to mean "any person not included in the term 'common carrier by water' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water" (46 U.S.C. 801).

jurisdiction over different facets of a person's activities. See, *e.g.*, *Baltimore & Ohio R.R.* v. *United States*, 201 F. 2d 795 (C.A. 3) (joint jurisdiction of Federal Maritime Board and Interstate Commerce Commission over piers owned by railroads); *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, 143 F. 2d 676 (C.A. 2) (joint authority of Federal Security Administrator and Federal Trade Commission over labeling of cosmetics). It is suggested, however, that this Court in *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, held that the provisions of Section 29 of the United States Warehouse Act, 7 U.S.C. 269, stating that "the power, jurisdiction, and authority conferred upon the Secretary of Agriculture under this chapter shall be exclusive with respect to all persons securing a license hereunder * * *", preclude any regulation of the grain elevator other than under the Warehouse Act.

The short answer to this contention is that the Warehouse Act authorizes regulation of the activities of the activities warehouses voluntarily licensed under that Act only insofar as they are related to the storage of agricultural products in the warehouse. It contains no provisions requiring approval by the Department of Agriculture of leases or agreements of warehousemen licensed or applying for licenses under that Act or with respect to stevedoring or transportation rates or services. As this Court made clear in the *Rice* case,

*supra*, Section 29 was adopted to eliminate dual regulation of warehousing activities by the federal government and the States and to substitute regulation of such activities by one agency, "the test * * * [being] whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act" (331 U.S. at 236).[6] The Court expressly held that despite Section 29 the states were free to act in those areas of warehouse regulation to which the federal Act did not apply (331 U.S. at 237).[7] The same conclusion is, minimally, applicable to other federal agencies.

It is not necessary to consider the extent to which the Commission could exercise regulatory control over

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[6] As originally enacted, Section 29 made regulation under the Warehouse Act subordinate to state regulation (39 Stat. 486). In 1931, however, Section 29 was amended for the purpose of eliminating state supremacy in this field by authorizing the Secretary only to "cooperate" with state authorities, and giving him "exclusive jurisdiction" over federally licensed warehousemen (46 Stat. 1463). *Rice* v. *Santa Fe Elevator Corp.*, *supra*, 331 U.S. at 222-24.

[7] The decision in *Cargill, Inc.* v. *Commodity Exchange Commission*, 103 F. Supp. 992 (cited at Pet. 2, 7), likewise affords petitioners no support. That case merely held that the Commodity Exchange Act, 7 U.S.C. 1, *et seq.*, which authorized local boards of trade to regulate trading in commodity futures contracts, did not authorize the boards of trade to promulgate rules relating to the *operation* of warehouses by persons licensed under the Warehouse Act. The case neither held nor intimated that the boards of trade could in no way regulate federally licensed warehousemen, see 103 F. Supp. at 997. On the contrary, it was suggested by this Court in *Rice* v. *Board of Trade*,

activities which are regulated by the Secretary of Agriculture under the Warehouse Act. For the Commission has not purported to exercise such authority. Instead, it held (Pet. 38–39) that basic agreement No. 8225, in providing that Cargill (1) will prefer the Baton Rouge facility over other facilities in the Gulf area, (2) will maintain rates competitive with but not greater than rates at other Gulf ports, (3) has the exclusive right to operate the terminal for up to 40 years and (4) has first call upon any new facilities which might be constructed by the port authorities, operates to "fix and regulate transportation rates or fares, give special privileges or advantages, control, regulate, prevent or destroy competition, and provide for an exclusive, preferential or cooperative working arrangement within the meaning of Section 15 [of the Shipping Act]" (Pet. 38–39).[8] It concluded, how-

331 U.S. 247, 254 n. 6, that regulations lawfully promulgated by boards of trade under the Commodity Exchange Act might validly be applied to federally licensed warehousemen.

[8] As the court of appeals commented in affirming this holding, "[t]his is no ordinary grain elevator. It is operated at a port. Its function is to facilitate the loading and unloading of grain for vessels using the port because of its handling and storage services. It is part and parcel of an over-all scheme for the greater commercial development and use of the Baton Rouge port area. An agreement pertaining to the exclusive operation of such an elevator, dealing with preferences and rates, maritime services and facilities, has such a significant maritime connection as to fall well within the jurisdicton and scope of authority of the Federal Maritime Board" (Pet. 23–24).

ever, that the agreement would not be in any way discriminatory or unfair or detrimental to the commerce of the United States and thus approved future operation thereunder (Pet. 39). Agreement No. 8225–1, which gave Cargill the exclusive right to conduct stevedoring services at the terminal, was found to be clearly within the coverage of Section 15 and its monopolistic result to be both detrimental to the commerce of the United States under Section 15 and an unjust and unreasonable practice under Section 17 of the Act (Pet. 39–40). Significantly, none of the provisions which the Commission and the court of appeals held brought the agreements within the ambit of Section 15 of the Shipping Act concerned matters over which the Secretary of Agriculture had exercised any regulatory authority under the provisions of the Warehouse Act.

2. Petitioners' subsidiary argument (Pet. 8–11)—that the court of appeals in its original opinion gave "[n]o consideration" to "the nature of the activities or functions covered by Agreement 8225 * * * for the reason that Agreement 8225 was not actually involved in the proceedings except in an incidental and essentially non-controversial fashion" and that it abused its discretion in not granting rehearing when the importance of agreement No. 8225 was disclosed by the institution of a penalty proceeding against Cargill—is patently lacking in merit. The court of appeals (as had the Commission (see Pet. 38–40)) clearly distinguished between the original agreement No. 8225 (see Opinion, Part III) and the amended agreement No. 8225–1 (see Opinion, Part IV). For the reasons in-

dicated above, it held, expressly and upon full and detailed consideration (Pet. 22–24), that the original agreement "comes within the terms of the Act [and Commission] approval must be secured before the agreement can be carried out by the parties" (Pet. 24). There was no defect whatever in the care and understanding with which the court below canvassed the issues raised by the basic agreement.

The fact that the government subsequently commenced an action to recover civil penalties from Cargill in conformity with the express provision of Section 15 of the Shipping Act, making it "unlawful" to effectuate any agreement falling under that section prior to approval of the Commission and (as amended by Public Law 87–346, 75 Stat. 764) specifying that violators of the section "shall be liable to a penalty of not more than $1,000 for each day such violation continues," obviously did not require rehearing of the court's carefully enunciated previous opinion. Both the Commission (Pet. 39) and the court of appeals (Pet. 24 n. 6) expressly held that Cargill's effectuation of the agreement prior to its approval was in violation of the Act, thus recognizing, and putting petitioners on notice, that Cargill was subject to the penalty provisions of the Act. Nor would the fact that those provisions had not been enforced for many years (Pet. 9) make them any less enforceable against Cargill. See, *e.g.*, *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100, 114, N. 10; *United States* v. *Morton Salt Co.*, 338 U.S. 632, 647–48. Moreover, if the circumstances of Cargill's violation of the Act call for any mitigation of the penalties it is, as the court of appeals pointed out (Pet. 45), free so to urge in the penalty proceedings.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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